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November 4, 1993

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

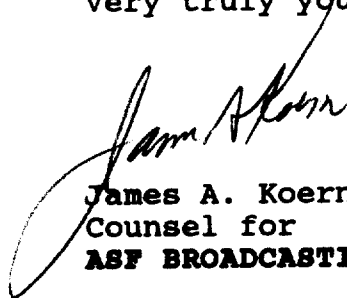
Re: MM Docket No. 93-107

Dear Mr. Caton:

On behalf of ASF Broadcasting Corporation, applicant in the above-referenced proceeding, there are transmitted herewith an original and six copies of its **REPLY TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS**

Should additional information be necessary in connection with this matter, please communicate with this office.

Very truly yours,


James A. Koerner
Counsel for
ASF BROADCASTING CORPORATION

Enclosures

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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In re Application of) MM Docket No. 93-107
DAVID A. RINGER, et al.) File Nos. BPH-911230MA
For Construction Permit for)
New FM Station on Channel 280A)
at Westerville, Ohio)

TO: Administrative Law Judge
Walter C. Miller

REPLY TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS

ASF Broadcasting Corporation ("ASF"), by its attorneys, hereby responds to the Proposed Findings of Fact and Conclusions filed in this proceeding by David A. Ringer ("Ringer"), Wilburn Industries, Inc. ("Wilburn"), Shellee F. Davis ("Davis"), and Ohio Radio Associates, Inc. ("ORA").

ASF here responds to the arguments dealing with ASF's two tier corporate structure and the effect upon its integration and diversification credits. This limitation, however, should not be construed as concurrence with other arguments advanced by the other applicants.

A two tier corporate structure is not inherently incredible nor unlikely of effectuation. The Commission has recently made clear:

"We look first to the record of the parties' activities after formation of the applicant to determine that: (1) the nominally controlling owners do not have either minimal, ministerial roles or

defer completely to the purportedly passive owners, who, in turn continue to exercise managerial control; and that (2) the nominally controlling owners formulated or at the very least became familiar with crucial aspects of the applicant's proposal. If the post formation record does not establish that the nominally controlling owners will exercise exclusive control, we look to the totality of the facts concerning the applicant's pre- and post-formation activities including whether the applicant was formed in a manner that is contrary to sound business judgment. The Commission also looks to factors relevant to whether the passive owner is adequately insulated." Isis Broadcasting Group, FCC 93-441, released September 24, 1993, para. 18.

The record evidence in this proceeding establishes conclusively that the nominally controlling owner, Ardeth S. Frizzell, was and is the moving force behind the application. Unlike instances in which an experienced broadcaster seeks out a "front" who knows nothing about the business, Ardeth Frizzell is, herself, an experienced broadcaster, and was, in fact, general manager of the very station she seeks to return to the air. (ASF Exhibit 3) She sought out the passive owner, Thomas J. Beauvais. (Tr. 181) She engaged counsel. (Tr. 193, 230) In short, from the very beginning, it has been the nominally controlling owner who has exercised all control. Thus, the activities after formation have met the Commission's test.¹

¹It should be noted that ASF was initially formed as a two tier corporation; it did not convert from a single tier after the filing of the application.

Having satisfied the Commission's criteria with respect to post-formation activities, the language of Isis suggests that there is no need to look to the totality of the facts to determine "whether the applicant was formed in a manner contrary to sound business judgment." However, examination of those facts reveals that there is nothing incredible about the structure or the formation of the applicant.

Although Ms. Frizzell and Mr. Beauvais did not know each other prior to the discussion leading to the formation of this applicant, each was extremely familiar with another person, Joanne Adams. (Tr. 180-181, 271) Mr. Beauvais had known Ms. Adams on a business level for many years, and had been her financial backer in another application. (Tr. 273, 178-179) Ms. Frizzell knew Joanne Adams as a former co-worker and friend. (Tr. 178-179) Accordingly, each of Mr. Beauvais and Ms. Frizzell had been well recommended to the other before their first meeting.

There was no need for Mr. Beauvais to scrutinize a prepared business plan. He knew that Ms. Frizzell had been general manager of WBBY. (Tr. 254-255) He knew that this was not an application for a new FM facility, but to replace one which, at that time, was still on the air, and had been on the air for a number of years. (Tr. 263-264) It was thus obvious that the community could support such a station.

Further, Ms. Frizzell would be putting up a significant amount of money, not simply making a nominal payment. (Wilburn Ex. 3, Tr. 187)

In short, Mr. Beauvais approached this transaction knowing that Ardeth Frizzell had the ability to manage not only a radio station but the very station for which application would be made, that she had incentive to make the station do well, i.e., her 25% equity interest and option to buy him out, and that the station was, at the very least, a viable operation. Ms. Frizzell approached the transaction knowing that Mr. Beauvais had acted in a similar capacity on at least one previous occasion, and that the application on that occasion had been successful through a hearing to an initial decision. The totality of the facts establish that this arrangement is not contrary to sound business judgment.

With respect to insulation, it should be kept in mind that the Commission has long distinguished between limited partnerships and corporations. In the case of corporations, the non-voting status of a participant, and the effect of state corporation laws take the place of an agreement which must explicitly provide insulation in the context of a limited partnership. Attribution of Ownership Interests (Reconsideration), 58 RR2d 604, 614 (1985). The requirement of insulating language in formative documents applies only to limited partnerships. Id. at 619-620.

The cases cited by the other applicants, e.g., Royce International Broadcasting, 5 FCC Rcd. 7063 (1990); Eugene Walton, 6 FCC Rcd. 6071 (Rev. Bd. 1991); Poughkeepsie Broadcasting Limited, 6 FCC Rcd. 2497 (1991) and similar cases have all involved limited partnerships which either failed to provide sufficiently for insulation or partners who failed to abide by the conditions. The entities involved were not corporations. Isis, on the other hand, did involve a two tier corporation. The matter of insulation was relegated to a single footnote (fn. 19) in which the Commission noted that a dozen or so discussions including requests for money, relative strengths of the other applicants, the need to relocate a transmitter site, and the possibility of settlement, did not indicate a lack of insulation. Apparently, the fact that the non-voting stockholder might be involved in the construction of the station had no adverse effect either. Isis, at para. 16.

On the basis of the record evidence in this proceeding and the Commission's own precedent, ASF must be awarded full integration credit as claimed, and suffers no diversification demerit.

Respectfully submitted,

ASF BROADCASTING CORPORATION

By 
James A. Koerner
Its Attorney

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NOVEMBER 4, 1993

CERTIFICATE OF SERVICE

I, Jeanne E. Butler, a secretary in the law offices of Baraff, Koerner, Olender & Hochberg, P. C., do hereby certify that copies of the foregoing **REPLY TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS** were sent this 4th day of November, 1993, via first class mail, postage prepaid to the following:

Administrative Law Judge Walter C. Miller*
Federal Communications Commission
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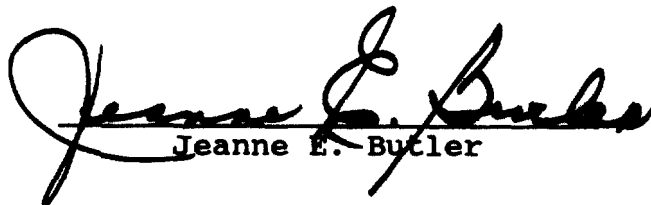
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